APPENDIX TO THE QUESTIONS FOR THE RECORD
WILLIAM P. BARR
NOMINEE TO BE UNITED STATES ATTORNEY GENERAL

Letter from William P. Barr, nominee to be Attorney General of the United States, to Chairman Lindsey Graham, Senate Committee on the Judiciary (January 14, 2019)

The Honorable Lindsey Graham
Chairman
Senate Committee on the Judiciary
United States Senate
290 Russell Senate Office Building
Washington, D.C. 20510

January 14, 2019

Dear Chairman Graham:

Thank you for taking the time to meet with me last week. I appreciated the opportunity to speak with you about my upcoming hearing before the Senate Judiciary Committee and my plans for the Department of Justice if I am confirmed.

During our meeting, you asked me about the legal memorandum that I drafted as a private citizen in June 2018, a copy of which I provided to the Committee last month. Although the memorandum is publicly available and has been the subject of extensive reporting, I believe there may still be some confusion as to what my memorandum did, and did not, address.

As I explained in my January 10, 2019 letter responding to questions posed by Ranking Member Feinstein, the memorandum did not address – or in any way question – the Special Counsel's core investigation into Russian efforts to interfere with the 2016 election. Indeed, I have known Bob Mueller personally and professionally for 30 years, and I have the utmost respect for him and the important work he is doing. When Bob was appointed, I publicly praised his selection and expressed confidence that he would handle the investigation properly. As I noted during our discussion, I personally appointed and supervised three special counsels myself while serving as Attorney General. I also authorized an independent counsel under the Ethics in Government Act. I believe the country needs a credible and thorough investigation into Russia's efforts to meddle in our democratic process, including the extent of any collusion by Americans, and thus feel strongly that that the Special Counsel must be permitted to finish his work. I assured you during our meeting – and I reiterate here – that, if confirmed, I will follow the Special Counsel regulations scrupulously and in good faith, and I will allow Bob to complete his investigation.

As for the memorandum itself, as we discussed during our meeting, the memorandum's analysis was narrow in scope. It addressed a single obstruction-of-justice theory under a specific federal statute, 18 U.S.C. § 1512(c), that I thought, based on public information, Special Counsel Mueller might have been considering at the time. The memorandum did not address any of the other obstruction theories that have been publicly discussed in connection with the Special Counsel's investigation.

The principal conclusion of my memo is that the actions prohibited by section 1512(c) are, generally speaking, the hiding, withholding, destroying, or altering of evidence – in other words, acts that impair the availability or integrity of evidence in a proceeding. The memorandum did not suggest that a President can never obstruct justice. Quite the contrary, it expressed my belief that a President, just like anyone else, can obstruct justice if he or she engages in wrongful actions that impair the availability of evidence. Nor did the memorandum claim, as some have incorrectly suggested, that a President can never obstruct justice whenever he or she is exercising a constitutional function. If a President, acting with the requisite intent, engages in the kind of evidence impairment the statute prohibits – regardless whether it involves the exercise of his or her constitutional powers or not – then a President commits obstruction of justice under the statute. It is as simple as that.

During our meeting, you asked why I drafted the memorandum. I explained that, as a former Attorney General, I am naturally interested in significant legal issues of public import, and I frequently offer my views on legal issues of the day – sometimes in discussions directly with public officials; sometimes in published op-eds; sometimes in amicus briefs; and sometimes in Congressional testimony. For example, immediately after the attacks of September 11, 2001, I reached out to a number of officials in the Bush administration to express my view that foreign terrorists were enemy combatants subject to the laws of war and should be tried before military commissions, and I directed the administration to supporting legal materials I previously had prepared during my time at the Department. More recently, I have offered my views to officials at the Department on a number of legal issues, such as concerns about the prosecution of Senator Bob Menendez.

In 2017 and 2018, much of the news media was saturated with commentary and speculation about various obstruction theories that the Special Counsel may have been pursuing at the time, including theories under section 1512(c). I decided to weigh in because I was worried that, if an overly expansive interpretation of section 1512(c) were adopted in this particular case, it could, over the longer term, cast a pall over the exercise of discretionary authority, not just by future Presidents, but by all public officials involved in administering the law, especially those in the Department. I started drafting an op-ed. But as I wrote, I quickly realized that the subject matter was too dry and would require too much space. Further, my purpose was not to influence public opinion on the issue, but rather to make sure that all of the lawyers involved carefully considered the potential implications of the theory. I discussed my views broadly with lawyer friends; wrote the memo to senior Department officials; shared it with other interested parties; and later provided copies to friends. I was not representing anyone when I wrote the memorandum, and no one requested that I draft it. I wrote it myself, on my own initiative, without assistance, and based solely on public information.

You requested that I provide you with additional information concerning the lawyers with whom I shared the memorandum or discussed the issue it addresses. As the media has reported, I provided the memorandum to officials at the Department of Justice and lawyers for the President. To the best of my recollection, before I began writing the memorandum, I provided

my views on the issue to Deputy Attorney General Rod Rosenstein at lunch in early 2018. Later, on a separate occasion, I also briefly provided my views to Assistant Attorney General Steven Engel. After drafting the memorandum, I provided copies to both of them. I also sent it to Solicitor General Noel Francisco after I saw him at a social gathering. During my interactions with these Department officials, I neither solicited nor received any information about the Special Counsel's investigation. In addition to sharing my views with the Department, I thought they also might be of interest to other lawyers working on the matter. I thus sent a copy of the memorandum and discussed those views with White House Special Counsel Emmet Flood. I also sent a copy to Pat Cipollone, who had worked for me at the Department of Justice, and discussed the issues raised in the memo with him and a few other lawyers for the President, namely Marty and Jane Raskin and Jay Sekulow. The purpose of those discussions was to explain my views.

As I explained during our meeting, I frequently discuss legal issues informally with lawyers, and it is possible that I shared the memorandum or discussed my thinking reflected in the memorandum with other people in addition to those mentioned above, including some who have represented clients in connection with the Special Counsel's work. At this time, I also recall providing the memorandum to, and/or having conversations about its contents with, the following:

- Professor Bradford Clark
- Richard Cullen
- Eric Herschmann
- Abbe Lowell
- Andrew McBride
- Patrick Rowan
- George Terwilliger
- Professor Jonathan Turley
- Thomas Yannucci

The foregoing represents my best recollection on these issues at this time. I look forward to discussing these issues further with you and your colleagues at my upcoming hearing.

Sincerely,

William P. Barr

Letter from William P. Barr, nominee to be Attorney General of the United States, to Ranking Member Diane Feinstein, Senate Committee on the Judiciary (January 10, 2019)

Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

January 10, 2019

Dear Senator Feinstein:

Thank you for your letter of December 21, 2018 regarding a memorandum that I drafted earlier last year, a copy of which I provided to the Senate Judiciary Committee last month.

As you note, my memorandum was narrow in scope, addressing only a single obstruction theory that I thought, based on public information, the Special Counsel might have been considering. The memorandum did not address – or in any way question – the Special Counsel's core investigation into Russian interference in the 2016 election. Indeed, I have known Bob Mueller personally and professionally for 30 years, and I have the utmost respect for him and the important work he is doing. Having appointed and supervised three special counsels myself while Attorney General, I understand that the country needs a credible and thorough investigation into Russia's efforts to meddle in our democratic process, including the extent to which any Americans were involved. For this reason, it is vitally important that the Special Counsel be permitted to finish his work. I will carry out the Special Counsel regulations scrupulously and in good faith, and I will allow Bob to complete his work.

Given my background, I am naturally interested in legal issues that have significant implications for our country. I have a deep commitment to the law and I enjoy researching, analyzing, and writing about legal issues. I frequently discuss my views with friends, colleagues, and public officials, and I have worked on a number of amicus briefs, written a law review article, published op-eds, spoken publicly on legal issues, and provided testimony to Congress.

In 2017 and 2018, based on public accounts, it appeared to me that the Special Counsel might be considering subpoenaing the President to explore his motives for terminating the FBI director on the theory that the removal may have constituted obstruction under 18 U.S.C. § 1512(c). I was concerned that predicating obstruction under this statute based solely on the removal of an FBI director would stretch the provision beyond its text and intent, and doing so could have implications well beyond the Special Counsel's investigation. As my thoughts took shape during informal discussions with other lawyers, I eventually decided to reduce my thinking on this issue to writing in a memorandum. I wrote as a private citizen. I was not representing anyone. No one requested that I write the memorandum. I drafted it myself without assistance and based on public information.

As the media has reported, and as I have explained to a number of your colleagues, I provided the memorandum to and had discussions about the issue with lawyers on all sides of the

Special Counsel's investigation, including officials at the Department of Justice and the White House, as well as lawyers for the President. Over time, I also provided the memorandum to several lawyer friends and had discussions about the issue with them and many others.

Thank you for the opportunity to address these issues. I look forward to discussing them further with you and your colleagues at my upcoming hearing.

Sincerely,

William P. Barr

Confirmation Hearing for William P. Barr to be Attorney General of the United States Before the Senate Committee on the Judiciary (November 12 and 13, 1991)

Colloquy with Senator Edward Kennedy located on pages 29-34 of the transcript

S. HRG. 102-505, Pt. 2

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS—WILLIAM P. BARR

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY

NOVEMBER 12 AND 13, 1991

Part 2

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entitled to make that purchase is because of a criminal record or history of mental illness or other disqualifying factor.

Now, the Brady waiting period the adminstration is willing to accept as part of the crime package applies only to handguns. Assault weapons, obviously, are at least as lethal, and why shouldn't we expand the scope of the Brady bill to encompass assault weapons, as well?

Mr. BARR. On the assault weapon front, the proposal before us is the DeConcini amendment. I think—I don't know if this is a new statement or not, but I would support both the Brady bill waiting period and the DeConcini amendment, provided they were parts of a broader and more comprehensive crime bill that included tough enforcement provisions, including very tough provisions on the use of firearms in crimes and illegal purchase and trading in firearms, which are part of the package that passed the Senate.

Now, to be candid, on the waiting period, I would prefer an approach that was directed toward point of sale, and I know that we are not at that point yet technologically. It is going to require more investment, and I have been involved in infusing those resources to upgrade the records. But the important thing, I think, ultimately, will be a system that is based on State records, a State system. And so I think the House approach is preferable, frankly, to the Senate approach.

On the DeConcini amendment, I would prefer a limitation on the clip size, but ultimately I would recommend the President sign a bill that had the Brady waiting period and a DeConcini assault weapons provision in it, as long as we had other tough crime measures in it that dealt with the other problems.

I have not considered before whether the waiting period should apply to assault weapons and would want to think about that, but off the top of my head, I don't think there should be an objection to that.

Senator KENNEDY. Well, as you know, DeConcini on the assault weapons does not provide for the waiting period for the assault weapons. And although it includes a number—I believe it is 11 sets of assault weapons, there are clearly others that result in the same kind of destruction and havoc and threat to law enforcement personnel.

I think the fact that you are forthcoming in terms of the waiting period for assault weapons is very constructive. We have—

The CHAIRMAN. And unusual for an Attorney General nominee.

Senator KENNEDY. We have here just the application for the purchase of weapons, and as you are familiar, prior to 1968, they didn't even ask the six or seven questions, which are probably the most rudimentary questions that there are. Of course, without having the opportunity to give local law enforcement the opportunity to check those, the significance and importance of them are significantly compromised. And it has been to try and give that period of time to local law enforcement that the waiting period has been supported, and there have been some important successes. In New Jersey over a period of time some ten thousand convicted felons trying to buy guns have been identified. I am not going to take the time of the committee to go through those.

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But the fact that you would be willing to consider seems to me to be logical. If it is important in terms of dealing with violence on the hand guns and on the kinds of weapons that have been used that have brought such destruction and violence to our fellow citizens, would certainly be justified as well, and that are threatening many of those in the law enforcement community.

Just let me ask you on one other related area, and that is on reviewing the licensing requirements for the sale of assault weapons, as you probably know, and I won't go through in great detail. But it is virtually four or five of the same kinds of questions, and you can get a license to sell these assault weapons and sell them to virtually anyone. And it seems to me that if it is good enough in terms of the purchase of the hand guns, in terms of checking out the background, and good enough in terms of trying to deal with the assault weapons, having some kind of idea about who is going to be selling these, who is going to be the licensee, given some of the recent information about who is selling assault weapons is worthwhile, as well.

Would you be at least willing to visit and talk about that particular issue and see what suggestions you might have on that?

Mr. BARR. Sure, Senator. I am always willing to consider that. In considering restrictions on the lawful sale of guns, I do start out with the threshold considerations that the most effective way ultimately of dealing with violent crime is to deal with violent criminals, and that anything that focuses exclusively on lawful sale is somewhat of a feckless exercise. But as part of a comprehensive approach, I think it is legitimate to take a look at reasonable steps, recognizing that there is a tradition of private gun ownership in this country and a legitimate interest in that, but nevertheless looking at reasonable steps as part of a broader approach to controlling the deadly use of firearms that is becoming an increasing part of the plague of violence, the crime that we have in our streets.

Senator KENNEDY. I liked your earlier answer better, but I am glad to hear this one, too. [Laughter.]

I would say to my good friend from South Carolina, if you need any recommendations on those vacancies up in Massachusetts, to fill those, I would be glad to help.

Let me go to another area, and that is the area that we talked about at the time that we had our visit, which I very much appreciated. That is with regard to the Wichita Operation Rescue case and the decision to file a brief in the Wichita Operation Rescue case, the *Women's Health Care Services* v. *Operation Rescue.* As we understand, historically the Federal Government has protected the individual rights, and when protesters attempted to prevent the black Americans from attending newly integrated schools by blocking the students' access, the Federal Government stepped in to ensure the students' safe entry. That was done at a time when there were many that really, out of a sincere belief, believed that the law was wrong during that time. It wasn't really a question whether they believed it was right or wrong. Still, the Justice Department acted.

But in this case, the U.S. Justice Department reached out to the district court in Kansas and entered the dispute on the side of the

lawbreakers. It weighed in with those who would forcibly deny a woman a Federal constitutional right to abortion. And it, as far as I am concerned, poured gasoline on an already volatile situation by making it appear that the Government supported the clearly unlawful acts of Operation Rescue.

The Government had already stated its position in a brief before the Supreme Court, defended in both cases the same entity, Operation Rescue, was even represented by the same attorney so there is no reason to believe the judge in Kansas would not be appraised of the pending Supreme Court case.

Why did the Government feel it necessary to sort of fan the flames in Wichita and to argue that Operation Rescue should be free from the Court's order prohibiting its illegal activities?

Mr. BARR. Well, thank you, Senator. This gives me the opportunity to describe what happened because I think it has been mischaracterized, largely, and people drew the wrong conclusions from the way it was publicly presented.

In describing it, I would like to emphasize three points. First, this was not viewed as an abortion issue in the Department. It was viewed as an issue of jurisdiction and the reach of the so-called Ku Klux Klan Act of 1871.

Second is that the Department did not side with the demonstrators. On the contrary, we condemn those who break the law and who violate other people's legal rights.

Third, this was not a gratuitous action by the Department where we reached out and tried to stir up an issue. On the contrary, we felt that circumstances came about that really drew us into it, and we tried in good faith to deal with it in a lawful way as we understood it.

The first point that I think bears emphasis is that Operation Rescue demonstrators who block abortion clinics are lawbreakers. They are treading on other people's legal rights. I do not support or endorse or sympathize with those tactics. As the President said, everybody has an obligation to obey the law, and as a Government official, my responsibility is to enforce the law and to protect people's rights.

The issue in Wichita was not whether those demonstrators should be dealt with. The issue in Wichita was which statute should be used to deal with them, which law enforcement agency should be used, and what court system should be used to deal with the demonstrators. And we believe that the applicable statutes were local and that the local police should be the law enforcement agency and that the local courts could deal with it. And this has been—in fact, in city after city around the country, that is how it has been handled—locally.

In Wichita, there was an attempt to federalize the issue. The clinics went to Federal court claiming that there was a violation of the Ku Klux Klan Act and seeking the intervention of Federal marshals to enforce their rights of access. Now, before Wichita, I learned at the time—I hadn't really focused on it before until the Wichita matter came up to me—but before Wichita, as you mentioned, this same effort had been made to federalize this issue, and that was in the Washington, DC, area. And that had been litigated up to the Supreme Court, and 3 to 4 months before Wichita, the

Department had filed a brief in the *Bray* case in the Supreme Court, saying that the Ku Klux Klan Act did not give Federal jurisdiction in these kinds of matters, that it required a class-based animus, certainly racial and possibly sexual class-based animus. But that was the limit of the jurisdiction under the Ku Klux Klan Act. So that was a position we had already taken by the time Wichita arose.

We had the additional situation where the district court judge in Wichita bought into the Ku Klux Klan Act theory. He issued a very broad injunction, sweeping injunction that had very stiff—as a condition of demonstrating, imposed a—I have forgotten what the term is now. But, anyway, the demonstrators had to pay in substantial moneys as a condition of demonstrating.

That concerned us, and then the order itself, the injunction itself, had very detailed instructions to the marshals about how to enforce the order.

The judge started holding press conferences and made statements—at least they were reported to me—about filling the jails, statements hostile to the elected officials, and also indicating that the Department of Justice fully supported his position. A number of components expressed concern about this state of affairs, and we had wide consultations within the Department, and it was decided that the best way to proceed, since we had already taken the position that the marshals did not have the jurisdiction to go in and do the things that they were now being told to do by the district court judge, was have the marshals obey the judge, have them obey the law, and call on everyone to obey the law, and then file an amicus with the court where we submitted the *Bray* brief—not rearguing the matter, just giving the judge a copy of the *Bray* brief to make it clear what our legal position was, but at the same time telling everyone to follow the judge's order.

I think for a period of time it helped defuse the situation out there and focus the attention on the courts and the legal process where it should be, rather than on the streets. But several days after that action, it appeared to me that other elements in Operation Rescue rekindled it and violated the law. They were arrested by—most of the arrests were by local police, but the marshals also made arrests. And I believe a number of them are being prosecuted for interfering with U.S. marshals.

But it was a legal question about the jurisdiction of the Ku Klux Klan Act, as I said, and we felt it was the proper thing to do, given the earlier position we had taken.

Senator KENNEDY. I am wondering if I could just finish. This is a very helpful statement and a good one.

The CHAIRMAN. Sure.

Senator KENNEDY. Just a final couple of points on this, if I could inquire, Mr. Chairman.

Do I understand you are saying that you think the Federal courts should not have jurisdiction to prevent interference with a woman exercising her constitutional right to choose abortion?

Mr. BARR. I was saying that the Ku Klux Klan Act doesn't provide that jurisdiction. I wasn't taking a policy position.

Senator KENNEDY. Well, you are aware that three Federal Courts of Appeals have decided this issue—the Second, Third, and Fourth

Circuits—as well as at least 12 Federal District Courts have held that section 1985-3 can be used to prevent groups like Operation Rescue from blockading clinics. The rulings have been based on interference with the right to travel. Only three District Courts, no Courts of Appeals, have taken views espoused by the Justice Department, which would deny women seeking abortions protection from these law-breakers.

I mean, effectively you are saying on the one hand they have a constitutional right, but you are leaving it up to the local law enforcement. And even in this case, you advocated that they lift the injunction against those that had been interfering with the clinic, and even in the face of the attorney that said, even if they don't lift it, I am not going to urge that they not continue their interference and their activities. And we are trying to find out what really the distinction is between the Justice Department that was prepared to go the extra mile on the basis of race over a period of 30 years to guarantee a constitutional right, and not prepared, evidently, to give the assurance of the protection and the safety to an individual here that is trying to pursue a constitutional right.

Mr. BARR. I think the issue for us as a matter of law was whether the Ku Klux Klan Act of 1871 was intended to provide that basis. I was not taking a position on whether the Government should or should not do that. Let me give you an example, and I do not mean to equate the two or analogize here, but I went to Columbia University during the riots in the late 1960's. People interfered, private citizens interfered with my constitutional rights, and I am not saying this is an analogous situation completely, but people blocked me from getting into the library, I know how it feels to be blocked when you are going about your lawful rights and it is quite offensive.

But even though I was being blocked in the exercise of my constitutional rights, I was being blocked not by the State, but by private people. And my remedy there was to go to State courts and get the city police to get them out of my way, which is what ultimately happened.

Now, with the Ku Klux Klan Act, the Federal Government has been given a role to play in certain circumstances where private parties combine to interfere with constitutional rights, but that is an exception to the rule. And the issue was whether that statute, passed in 1871, was designed to give the Federal Government that kind of a role in the matter of abortion and when this issue came to me the Department had already taken an issue on the position.

Senator KENNEDY. Well, I would just cease and hope you give responses.

I understand the 1985 Act prohibits a conspiracy to deprive a person, a class of persons from equal protection or equal privileges. Operation Rescue blockades are aimed at preventing pregnant women from obtaining abortions. Now, Congress said in the Pregnancy Discrimination Act, and that passed 75-to-11, that discrimination based on pregnancy is a sex discrimination under title VII.

So the Justice Department action in Wichita abandoned its traditional role of advocating the protection of civil rights under title VII. If we said that it is under title VII, with the Pregnancy Discrimination Act, falls within that, it would appear to me that there

are those kinds of requirements for the protection of individuals. I do not know whether you have any kind of comment, my time is gone.

Mr. BARR. I would want to have, you know, I would want to see that issue briefed before reaching a conclusion, but off the top of my head, my feeling there is if the class that is being invidiously discriminated against are pregnant women then title VII might apply, but that is not what was happening here. These people were not invidiously discriminating or demonstrating against all pregnant women. They were against abortion, both the patients and the people performing the abortion, that was the activity they were demonstrating against.

But I would want to have that issue fully briefed before I reached any conclusions on it.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. Let me ask the nominee as well as the committee a scheduling issue here. This was noticed for continuing tomorrow as well. I have no intention of ending now. We are going to go for a while longer, but it is my inclination, but I would be interested in my colleagues input that we finish today about 5:30. And that would get us so that we have at least two more of our colleagues, excuse me, three to four more of our colleagues be able to ask questions and then begin tomorrow at 10 o'clock.

Things are going fairly smoothly, I think we can just keep going along at that pace, if that is all right with the committee. Is that appropriate?

Well, then why do we not give you a chance to stretch your legs, a five-minute break right now, and then we will continue.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator GRASSLEY. And before you begin, Senator, I am told that there is going to be a vote around 5:15 and so hopefully we can get three or four more of our colleagues in before we break for that vote, if that is possible.

I have not been following, but what has been our time allotment? I forget.

The CHAIRMAN. Technically it has been 15 minutes, and in almost every case it has gone longer.

Senator GRASSLEY. OK, well, I probably will not use more than 15 minutes.

Mr. Barr, as you probably remember and I am sure that we have talked privately at other times when you have been around my office, of my interest in the False Claims Act of 1986. I was involved with the writing of that act, and as everybody knows that act was passed to give incentives for individuals who know about fraudulent use of taxpayer's money, the ability to take cases to the court and get a judgment or get a portion of what the Treasury would find in a favorable judgment.

For the False Claims Act to work it is very important that the Justice Department not fight efforts by private qui tam relators to pursue claims on behalf of the Treasury. Sometimes I have had cause for concern whether or not there has been a real commitment on the part of DOJ to prosecute in qui tam suits.